Supreme Court, U S
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No. 98-704

In The

Supreme Court of the United States

October Term, 1998

SOMMERDYKE ESTATE,

Petitioners,

v.

CITY OF KENTWOOD,

Respondent.

On Petition For Writ Of Certiorari
To The Michigan Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Michigan Supreme Court in *City of Kentwood v. Sommerdyke Estate*, 458 Mich. 642, 581 N.W.2d 670 (1998), erroneously ruled that the State of Michigan has the constitutional authority under its Highway By User Statute to condition the retention of certain property rights on the performance of an affirmative act within a reasonable statutory period.

PARTIES TO THE PROCEEDING

Petitioners

Charles D. Waddell and Fernando Cioni[1]

Respondent

City of Kentwood, State of Michigan

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[1] Mrs. Waddell passed away during the pendency of this case.

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OPINIONS BELOW

The Michigan Supreme Court granted leave to appeal in this matter on September 23, 1997, bypassing decision by the Michigan Court of Appeals. *City of Kentwood v. Sommerdyke Estate*, 456 Mich. 868, 569 N.W.2d 616 (1997). The Michigan Supreme Court decided several procedural motions and motions granting leave to file amici curiae briefs. The Michigan Supreme Court's decision is reported at 458 Mich. 642, 581 N.W.2d 670 (1998), and is printed in Appendix A of Petitioners' Writ for Certiorari.

The Circuit Court for the County of Kent, State of Michigan, issued its opinion in this matter on March 20, 1997. The Circuit Court's opinion is printed at Appendix B, pp. 87a-99a of the Petitioners' Writ of Certiorari. The Circuit Court entered Judgment in Condemnation on April 16, 1997. The Judgment is printed at Appendix C in the Petitioners' Writ of Certiorari.

JURISDICTION

Respondent agrees with the Petitioners' statement of jurisdiction. The Michigan Supreme Court issued its opinion on July 31, 1998. The Petition for Writ of Certiorari was filed within 90 days of the issuance of that opinion. The jurisdiction in the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in a criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mich. Const. 1963, Art. I § 17

No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right

of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

Mich. Const. 1963, art. X § 2

Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record.

GENERAL HIGHWAY LAW
CHAPTER I – LAYING OUT, ALTERING AND DISCONTINUING HIGHWAYS

221.20. Public highway; definition, width

Sec. 20. All highways regularly established in pursuance of existing laws, all roads that shall have been used as such for 10 years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used 8 years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act. All highways that are or that may become such by time and use, shall be four rods in width, and where they are situated on section or quarter section lines, such lines shall be center of such roads, and the land belonging to such roads shall be two rods in width on each side of such lines.

Mich. Comp. Laws Ann. § 221.20 (West 1990); Mich. Stat. Ann. § 9.21 (Lexis 1997).

RESPONDENT'S STATEMENT OF THE CASE

The parties stipulated to the material facts of this case. This matter arises out of a condemnation action filed by the Respondent, City of Kentwood, State of Michigan ("City") to improve one of its streets, Fifty-second Street, which was created by use and subject to Michigan's highway by user statute. Mich. Comp. Laws Ann. § 221.20 (West 1990); Mich. Stat. Ann. § 9.21 (Lexis 1997). For decades, municipalities throughout the State of Michigan and public and private utilities have relied on the presumptive 4 rod (66 feet) wide right-of-way in Michigan's highway by user statute, for not only public travel, but also for providing their constituents the basic necessities of life, such as water, sewer services, electricity, heating fuels and communications.

On May 23, 1994, the City filed its condemnation action against all parties who had ownership in approximately thirty different parcels located on both the north and south sides of Fifty-second Street. To accommodate existing and anticipated traffic patterns and public transportation needs, the City expanded Fifty-second Street from two to four lanes and installed storm drains, curbing, sidewalks and concreted driveway entrances for private drives.

The City successfully resolved all concerns raised by the property owners except for the property owned by

the Petitioners, Charles D. and Luciana Waddell and Fernando Cioni at 3160 Fifty-second Street, Parcel No. 41-18-34-200-005. The Petitioners obtained title to this property on January 27, 1973.

The City acquired two different property interests from Petitioners' parcel. The City acquired a 30 feet temporary grading permit for which the City paid a $100 fee, and the City acquired a 50.3 feet wide strip of road frontage which included the existing 33 right-of-way from the center of Fifty-second Street. The Petitioners never challenged the necessity of the City's street improvement project.

Fifty-second Street originated decades ago as a county section line road. The public acquired the existing right-of-way for Fifty-second Street by use rather than by grant or express dedication. Since Fifty-second Street had been used as a public highway for decades, the City considered, consistent with its understanding of Michigan law, that the highway by user right-of-way was 66 feet wide, or 33 feet wide on each side of the center line of the existing road.

In reliance on the Michigan Court of Appeals decision of *Jaschuk v. Manistee County Road Commission*, 205 Mich. App. 322, 517 N.W.2d 318 (1994), *lv. den.*, 450 Mich. 861, 539 N.W.2d 375 (1995) *reh. den.*, 543 N.W.2d 314 (1995), the Petitioners contended that the City could only claim that part of right-of-way which it actually used. In this regard, the Petitioners did not contest the City's claim to 16 feet of the 33 feet wide right-of-way along their property. The 16 feet of undisputed right-of-way included a 10 feet wide asphalt street from the center line

of Fifty-second Street and an additional 6 feet wide shoulder and open drainage ditch area. The Petitioners claimed ownership to the remaining 17 feet wide area. The parties stipulated that Petitioners mowed the grass located within the 17 feet strip, but the Petitioners never maintained any structures or other activities within the disputed land area.

For the previous decades, the Kent County Road Commission acted as the City's agent for controlling uses within the right-of-way along Fifty-second Street. On November 5, 1979, the Kent County Road Commission approved an application submitted by the Michigan Consolidated Gas Company for a highway permit to install a 2" gas line within the 17 feet disputed land area. On November 14, 1983, the Kent County Road Commission approved a second highway permit for the Michigan consolidated Gas Company to extend the existing gas line. The gas company installed both gas lines approximately 26 feet from the center line of Fifty-second Street, which was about in the middle of the 17 feet disputed right-of-way. On May 20, 1982, the Kent County Road Commission approved a permit for an independent contractor, Wolverine Paving, Inc. to install a private driveway in the right-of-way of the Petitioner's parcel.

As noted above, the Petitioners purchased the property in 1973, before the Michigan Consolidated Gas Company installed its gas lines. There are no real estate instruments showing a conveyance of easements or fee title transfer of property to the Michigan Consolidated

Gas Company.[2] The Petitioners never pursued any legal action against the Kent County Road Commission or the Michigan Consolidated Gas Company for trespass damages resulting from the installation of the aforementioned gas lines.

On August 1, 1995, the City filed a motion for summary disposition which requested a legal determination on the Petitioners' claim to the 17 feet of disputed right-of-way. The City contended it could claim an easement interest to the entire 66 feet right-of-way along the Petitioners' parcel based on Michigan Supreme court case law. On the other hand, the Petitioners filed a cross motion asking the court to rule in their favor based on the Michigan Court of Appeals decision in *Jaschuk*. After entertaining oral argument on August 25, 1995, the trial court ruled that *Jaschuk* controlled and that the City would have to show actual use in order to claim the right-of-way.

The case was scheduled for a jury trial. However, because there were not many factual issues in dispute, the parties waived their right to a jury trial and agreed to submit the case for decision on stipulated facts, which were submitted to the trial court on November 11, 1996. In its submission, the City advocated two issues. First,

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[2] The title work disclosed a right-of-way conveyance to the Michigan Bell Telephone Company in August of 1968. This easement was 16½ feet in width (1 rod) for an underground telephone cable. The center line of the easement was 41.25 feet south of the center line of Fifty-second Street. Thus, the telephone easement lies on the Petitioners' property directly adjacent to and south of the disputed 17 feet right-of-way.

the City reasserted that Michigan Supreme Court cases superseded the *Jaschuk* Court of Appeals decision, and based on the stipulated facts, the City enjoyed access to the entire standard 66 feet wide right-of-way under the highway by user statute. In the alternative, the City argued that the highway permits, issued by the City's agent, the Kent County Road Commission, evidenced actual control and use of the disputed right-of-way.

The trial court issued its written opinion on March 20, 1997. Once again, the trial court ruled that *Jaschuk* controlled the case. Secondly, the trial court ruled that the gas line did not amount to an actual use under the *Jaschuk* opinion. Consequently, the trial court awarded compensation of $26,210.89 to the Petitioners for the land area within the disputed 17 feet right-of-way. The trial court entered Judgment on its opinion on April 16, 1997.

On May 5, 1997, the City filed its Claim of Appeal by right in the Michigan Court of Appeals. In the meantime, on June 2, 1997, the City filed an application for immediate appeal to the Michigan Supreme Court. On September 23, 1997, the Michigan Supreme Court granted the City's application for leave to appeal prior to a decision by the Michigan Court of Appeals. The Michigan Supreme Court also granted motions to a number of parties to appear as amicus curiae, and it invited other interested persons and groups to move for permission to file briefs amicus curiae. The Michigan Supreme Court conducted oral argument on March 3, 1998.

The Michigan Supreme Court issued its decision on July 31, 1998. In the majority opinion authored by Justice

Cavanaugh, the Michigan Supreme Court upheld previous Michigan Supreme Court case law which ruled that the highway by user statute created a rebuttable presumption that highways created by use are 4 rods or 66 feet wide and that this rebuttable presumption, or implied dedication, did not impose a "taking" of private property without just compensation. The majority opinion found this rebuttable presumption to be in accordance with the United States and Michigan Constitutions which allow a governmental entity to condition the retention of property rights on the performance of an affirmative act within a reasonable statutory period. The majority opinion found that the statutory presumption did not violate due process of law. Consequently, the Michigan Supreme Court ruled in favor of the City and reversed the trial court's decision.[3]

Justice Taylor wrote a separate opinion, concurring in part and dissenting in part. Justice Taylor agreed with the majority opinion that the statute's presumption of a 66 feet wide implied dedication was constitutional, but he would have applied the ruling of the court prospectively from the date of the opinion.

Justice Weaver, who was joined by Justice Brickley, dissented. Justice Weaver had previously authored the controversial *Jaschuk* opinion when she was a judge on

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[3] Because the majority opinion of the Michigan Supreme Court upheld the highway by user statute's rebuttable presumption of a 66 feet dedication for highway acquired by use, it did not address the City's alternative argument that the highway permits involving the disputed 17 feet area evidenced actual use.

the Michigan Court of Appeals. In her dissent she wrote that the majority opinion's interpretation of the highway by user statute is unconstitutional because it allows for the taking of property without just compensation. Justice Weaver interpreted Michigan's highway by user statute as limiting a public highway acquired by use to the width of actual use.

ARGUMENT I

Michigan's Highway By User Statute *Does Not* Impose A Taking.

A. The highway by user statute lawfully conditions the retention of a property right upon the performance of an act within the limited period of time.

In widening Fifty-second Street in relation to the Petitioners' property, the City asserted a property right to use the full 66 feet width of the right-of-way. The City's property interest existed decades before the Petitioners even became owners of the subject property in 1973. The Michigan Supreme Court in *Kentwood* upheld the City's claim under the highway by user statute, because a state has the authority to condition the retention of certain property rights on the performance of an affirmative act within a reasonable statutory period.

The Petitioners wrongfully attack Michigan's highway by user statute as confiscatory. They contend that the statute violates the Fifth Amendment which prohibits taking a property without payment of just compensation. From the City's point of view, the key question is whether Michigan's highway by user statute amounts to a taking.

The Michigan Supreme Court in *Kentwood* correctly determined that the statute's rebuttable presumption does not constitute a taking. In reaching this decision, the Michigan Supreme Court reaffirmed legal precedents that have existed in Michigan's jurisprudence for over 140 years, and it reaffirmed an interpretation of a statute that has existed in its essential form since Michigan's admission as a state into the Union in 1837.

The City agrees with Petitioner that the government cannot take private property without just compensation. From the time Michigan was a territory, Michigan courts have recognized that government cannot deprive an individual of his property without due process of law and without compensation. *Peterman v. Department of Natural Resources*, 446 Mich. 177, 186, 521 N.W.2d 499, 505 (1994). Both the Fifth Amendment of the United States Constitution and Article 10, Sec. 2 of Michigan's Constitution 1963, prohibit governmental taking of private property without just compensation. *Bevan v. Brandon Township*, 438 Mich. 385, 389-390, 475 N.W.2d 37, 40 (1991); *citing Armstrong v. United States*, 364 U.S. 40, 49 (1960).

However, just as it is wrong for the government to take private property without just compensation, the City submits that it is equally wrong to require the government to pay for a property interest that it already enjoys. In this case, when the Petitioners demanded just compensation for the 17 feet of disputed right-of-way, they were demanding compensation for a property interest they did not own.

The parties to this case stipulated that the subject street, Fifty-second Street, was a section line road which

had been used as a public highway for decades. The City claimed it owned the 66 feet wide right-of-way along Fifty-second Street under Michigan's highway by user statute which provides as follows:

> All highways regularly established and pursuant to the existing laws, all roads that shall have been used as such for ten years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used eight years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act. All highways that are or that may become such by time and use shall be four rods in width [66 feet] and where they are situated on section or quarter section lines, such lines shall be the center of such roads, and the land belonging to such road shall be two rods [33 feet] in width on each side of such lines.

Mich. Comp. Laws Ann. § 221.20 (West 1990); Mich. Stat. Ann. 39.21 (Lexis 1997)

This statute has existed in its essential form for 160 years. It can be traced back to 1838. *See* Sec. 42, Title 7, *First Part of Revised Statutes in Michigan 1838;*[4] *see also,*

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[4] Sec. 26. Public roads to be laid out by the commissioners of highways, shall not be less than four rods wide . . .

. . .

Sec. 42. All public highways now in use, heretofore laid out and allowed by any law of this state, or of the late territory of Michigan, of which a record shall have been made in the office of the clerk of the county or township, and all roads not

Sec. 29 of Chapter 25, p. 137, *Revised Statutes of 1846*. The earlier versions of the statute, such as Sec. 29 of Chapter 25, p. 139, *Revised Statutes of 1846* had a twenty year period of use instead of a shorter period of eight or ten years. *See, Ellsworth v. Grand Rapids*, 27 Mich. 250, 255 (1873). The current statutes dates to Sec. 20 of Chapter 1 of 1881 Public Act 243. All versions of this statute mandated that a public highway acquired by use shall be four rods or 66 feet in width.

There is a long line of Michigan Supreme Court cases, one predating the Civil War, which has consistently upheld the statute's 66 feet wide right-of-way. In *Bumpus v. Miller*, 4 Mich. 159 (1856), the Michigan Supreme Court held that the statutory width of highways established by user was presumed to be four rods, or 66 feet. In this regard, the Michigan Supreme Court in *Bumpus* stated:

> The statute provides a public highway shall be four rods wide . . . whether the highway is acquired by user only, or under the provisions of the Constitution, it must be four rods in width. A dedication or donation, when not expressly or impliedly restricted by the owner, is not confined in the mere track which is beaten by carriages and the feet of animals in passing along, but includes and carries with it four rods in width, as provided by the statute. . . .

Id. at 164.

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recorded, which have been, or shall have been used as public highways twenty years or more, shall be deemed public highways, but may be altered according to the provisions of this chapter.

Thus, beginning with *Bumpus*, the Michigan Supreme Court interpreted the highway by user statute as creating a rebuttable presumption that a property owner intended to dedicate a 66 feet wide right-of-way to the public. To rebut the presumption, the land owner had to assert his right within the prescribed period by either affirmatively interfering with the public use, such as erecting a structure in the right-of-way, or initiating a legal action. Through the years, the Michigan Supreme Court repeatedly endorsed this statutory rebuttable presumption of 66 feet. *See, Ellsworth v. Grand Rapids*, 27 Mich. 250 (1873); *Krueger v. LaBlanc*, 70 Mich. 76, 79, 37 N.W. 880 (1888); *Campau v. City of Detroit*, 104 Mich. 560, 62 N.W. 718 (1895); *Eyde Brothers Development Co. v. Eaton County Drain Comm'r*, 427 Mich. 271, 398 N.W.2d 297, 309-310 (1986).

Despite this array of legal precedents, in 1994 the Michigan Court of Appeals decided *Jaschuk v. Manistee County Road Commission*, 205 Mich. App. 322, 517 N.W.2d 318 (1994), *lv. den.*, 450 Mich. 861, 539 N.W.2d 375 (1995); *reh. den.*, 543 N.W.2d 311 (1995) which ruled that the 66 feet wide rebuttable presumption under the highway by user statute was unconstitutional. *Jaschuk* restricted the public easement to actual use.[5]

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[5] As noted above, the *Jaschuk* decision was authored by Judge Elizabeth Weaver, who at the time served on the Michigan Court of Appeals, and she subsequently wrote the dissenting opinion in the subject case as Justice Weaver of the Michigan Supreme Court.

Both *Jaschuk* and the Petitioners mistakenly rely on the Michigan Supreme Court case of *Eager v. State Highway Commission*, 376 Mich. 148, 136 N.W.2d 16 (1965). The Petitioners contend that *Eager* invalidated the 66 feet rebuttable presumption as an unconstitutional taking. The City respectfully submits that the Petitioners have mischaracterized the *Eager* decision. In *Eager*, the land in dispute had been continuously used and maintained by the property owners for more than fifty years, first as a private parking space for a hotel and then subsequently as gasoline pumps for a gas station. *Eager* correctly held that in that circumstance it was inappropriate to take property without payment of just compensation. *Eager* did not obliterate the statutory presumption of 66 feet, but instead the Michigan Supreme Court in *Eager* expressly recognized the principle of the statutory presumption:

> In the instant case there has been no dedication, except as such may be implied or presumed from user for more than the statutory period of repose (*Krueger v. LaBlanc, supra; Campau v. City of Detroit*, 104 Mich. 560, 62 N.W. 718 (1895)), but such implied dedication, as last above indicated, applies only to the extent of the user. And for good reason, because the implications of dedication resulting from owners permitting uninterrupted public user as a road for the statutory period arises from the fact that such user and statute governing same give the owner notice that, if he means to dispute the rightfulness of the public user, he must assert his right within the statutory period by physical action or suit.

136 N.W.2d at 19. *Eager* was simply one case in which the property owner successfully rebutted the presumption of 66 feet by demonstrating actual use of the right-of-way.

Therefore, from the City's standpoint, the Petitioners' first argument for review is flawed in at least two respects. First, the Petitioners continue to rely on misconception of the *Eager* decision. In their brief in support of their Writ of Certiorari, the Petitioners all but ignore the *Kentwood's* analysis of *Eager*, which correctly interpreted the law and distinguished *Eager* as one case where the property owner successfully overcame the rebuttable presumption.[6]

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[6] The Michigan Supreme Court correctly interpreted and applied the *Eager* holding in the *Kentwood* decision. In this regard, the Michigan Supreme Court in *Kentwood* stated:

> We recognize that after establishing a presumption of dedication had been rebutted, the court in *Eager* made the assertion that privately owned land cannot become public road by user beyond the portion used as such merely by the statutory pronouncement to that effect. We believe that this sentence, when read in the context of the whole opinion, supports our proposition that *where there is evidence that the presumption has been rebutted within the statutory period*, privately owned land cannot become a public road merely because the statute presumes the road to be four rods wide. To the extent that the dissent claims that this statement supports the proposition that the public road is *always* only as wide as actual use, we disagree. If we read *Eager* to support the proposition of the dissent, the court's alleged pronouncement that a road is always only as wide as actual use would be dicta because, as noted previously, the presumption was effectively rebutted in that case. To be sure, we now clarify our holding in *Eager* and limit it to cases

Secondly, the Petitioners' Writ is flawed because it unjustifiably seeks further review of 160 years of Michigan jurisprudence involving the scope of Michigan defined property right, a Michigan statute and a century of Michigan legal precedents, which have demonstrated ample sensitivity to the Fifth Amendment takings issue.[7] *See, e.g., Bumpus*, 4 Mich. at 163; *Eyde Brothers*, 398 N.W.2d at 308-310, *supra*.

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where the presumption has been rebutted. The public road is only as wide as actual use when the plaintiff presents evidence that the presumption of dedication has been rebutted within the statutory period of repose. 581 N.W.2d at 677.

[7] Petitioners noted in footnote 7 of their brief that other jurisdictions which have addressed highway by user statutes have determined that a public way established by user is only as wide as the actual use. *Citing User v. Mobbs*, 493 N.Y.S.2d 531 (1985); *Keidel v. Rask*, 304 N.W.2d 402 (N.D. 1981); *Barfnecht v. Town Bd. Of Hollywood Twp.*, 232 N.W.2d 420 (1975). Without going into detail, the City believes these cases are distinguishable, for among other reasons, these cases do not discuss whether a state's conditioning retention of a property interest on the performance of an affirmative act within a specified time period amounts to a taking. *See Texaco v. Short*, 454 U.S. 516 (1982). In any event, other state jurisdictions which have interpreted their highway by user statutes have found them constitutional. *See, Board of County Road Commissioners v. Flickinger*, 687 P.2d 975, 984 (Col. S. Ct. 1984); *Dunnick v. Stockgrowers Bank*, 191 Neb. 370, 215 N.W.2d 93, 96 (1974).

B. **The Michigan Supreme Court correctly ruled, consistent with United States Supreme Court decisions, that Michigan's highway by user statute is constitutional and does not create a taking of property without just compensation.**

The Michigan Supreme Court in *Kentwood* ruled that a state, such as Michigan, has the authority to condition the retention of certain property rights on the performance of an affirmative act within a reasonable statutory period. 581 N.W.2d at 676. This holding is entirely consistent with decisions by this Court.

First, the Michigan Supreme Court in *Kentwood* properly reasoned that the statutory presumption of a 66 feet wide right-of-way merely defines the scope of a property interest in private land. A state has the right to define the nature of property interest, and it can define property interest in derogation of the common law. For example, in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), this Court stated:

> Property interests of course are not created by the Constitution. Rather, they are created and the dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or undertakings that secure certain benefits and that support claims of entitlement to those benefits.

Secondly, the Michigan Supreme Court in *Kentwood* correctly applied this Court's decision in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), which effectively refutes the Petitioners' takings argument. In *Texaco*, this Court considered a challenge to an Indiana statute regarding the

automatic lapse of mineral rights. Pursuant to this statute, a mineral interest in land that is owned as a separate subterranean estate, which was not used for a period of twenty years, automatically lapsed and reverted to the current surface owner of the property, unless the mineral owner prior to the end of the twenty year period or within a two year grace period after the effective date of the statute, filed a statement of claim in the local county recorder's office.[8] The property owners in *Texaco* asserted, among other arguments, that this statute unconstitutionally effectuated a taking of property without just compensation. This Court disagreed. The Court in *Texaco* observed that it has:

> [U]pheld the power of the state to condition the retention of a property right upon performance of an act within a limited period of time. In each instance, as a result of the failure of the property owner to perform the statutory condition, an interest and fee were determined as a matter of law to be abandoned and to lapse.

454 U.S. at 529. In rejecting the takings argument, this Court stated further:

> In ruling that private property may be deemed to be abandoned and to lapse upon the failure of its owner to take reasonable actions imposed by law, this Court has never required the state to

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[8] Any interest in coal, oil and gas, and other minerals, if used for a period of twenty years, may be extinguished, unless the statement of claims is filed in accordance with Sec. 5 hereof [sic], and the ownership shall revert to the then owner of the interest out of which it was carved. Ind. Code § 35-5-11-1 (1976); *cited in Texaco*, 454 U.S. at 518, n.3.

> compensate the owner for the consequence of his own neglect. We have concluded that the state may treat a mineral interest which has not been used for twenty years and for which no statement of claim has been filed as abandoned. It follows that, after abandonment, the former owner retains no interest for which he may claim compensation. It is the owner's failure to make use of the property – and not the action of the state – that causes the lapse of the property rights; there is no "taking" that requires compensation.

Id. at 530.[9]

Texaco has continued to provide guidance to this Court in deciding takings cases. For example, in *United States v. Locke*, 471 U.S. 84, 103-110 (1984), this Court relied extensively on *Texaco* in rejecting a constitutional challenge to a United States government statute (43 U.S.C. § 1744) which caused owners to forfeit their unpatented mining claims if they failed to comply with annual filing requirements. Justice Stevens cited extensively to the *Texaco* case in writing a concurring opinion in *Hodel v. Irving*, 481 U.S. 704, 729-732 (1986), which concerned a challenge to a statute which sought to ameliorate the fractionalization of Indian lands held in trust.

Kentwood is not analytically distinguishable from *Texaco*. Michigan declared as early as 1838 that a property

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[9] Michigan has a similar type statute as the one at issue in *Texaco*. Michigan's dormant mineral act has withstood similar constitutional challenge before the Michigan Supreme Court. *VanSlooten v. Larsen*, 410 Mich. 21, 299 N.W.2d 704 (1980), *cert. den.*, 455 U.S. 901 (1982).

owners' retention of their interest in a public highway established by use is conditioned on the performance of certain actions, within a prescribed time period, presently eight or ten years. This statute applies uniformly to all persons owning property in Michigan. If a Michigan property owner permits the public to use a portion of his property as a public road, then the statute puts the property owner on notice that his property interest will be subject to the 66 feet wide right-of-way. The statute is not coercive. The decision to permit the public use of private property resides solely in the discretion of the property owner. The statute in no way forces the property owner to permit such public use or to acquiesce to a 66 feet width. Based on the *Texaco* decision, such acquiescence does not constitute a taking. Instead, it represents a constitutional exercise of state power.

The Petitioners attempt to distinguish *Texaco* by arguing that mineral rights at issue in *Texaco* and fee simple property rights are of such different character that *Texaco* should not apply. A careful reading of *Texaco* dispels this argument. The *Texaco* ruling was based in part upon previous United States Supreme Court cases which involved the extinguishment of a fee simple interest in property. For example, *Texaco* cited to *Hawkins v. Barney's Lessee*, 5 Pet. 457, 8 L.Ed. 190 (1831), in which the Court upheld a Kentucky statute that prevented a land owner from recovering property on which the defendant had resided for more than seven years under a claim of right. 454 U.S. at 526. *Texaco* cited to *Wilson v. Iseminger*, 185 U.S. 55 (1902), in which the Court upheld a Pennsylvania statute that provided for the extinguishment of a reserved interest in ground rent if the owner collected no rent and

made no demand for payment for a period of twenty-one years. Even though the effect of the statute was to extinguish a fee simple estate of a permanent duration, the Court still upheld the legislation as valid. 454 U.S. at 527. Indeed, as noted by Justice Stevens in his concurring opinion in *Hodel, supra*:

> The value of a property owner's interest does not provide a yard stick for measuring "the scope of the dual constitutional guarantees that there be no taking of property without just compensation and no deprivation of property without the due process of law".

481 U.S. at 726.

Therefore, the precise nature of the property right is not determinative of the takings issue. Consequently, the Petitioners' argument for distinguishing *Texaco* is simply invalid.

The Petitioners attempt to evade the *Texaco* precedent by citing to *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1986). However, *Nollan* does not usurp Texaco's application here, *Nollan* is distinguishable from the facts of *Kentwood*. In *Nollan*, the governmental authority conditioned the issuance of a building permit, which represented a perfectly legitimate use of the property, on the land owner granting a public easement across his beach front. This case had nothing to do with a statute of uniform application conditioning a retention of a property interest on property owners performing an affirmative act within a prescribed period of time. *Nollan* did not involve a question of lapsed property interests through the property owner's failure to preserve them. Instead, the local government extorted a property right from a

specific property owner who had no opportunity to preserve his property interest. The Michigan Supreme Court's majority opinion in *Kentwood* correctly noted this significant difference between *Nollan* and Michigan's highway by user statute:

> The one notable difference between *Nollan* and this case is that Michigan has not required the original property owners to give the property to the state. Instead, the Michigan statute allows the land owner to assert the right to the property within ten years after the creation of the road as a public road by use. If ten years pass without continuous assertion of a right by the property owners, the law presumes that the owner intended to dedicate the entire four-rod width of the road. It is only after the property owners have failed to act to preserve their right to the property that the property is deemed dedicated to the state. Indeed, *Nollan* supports this. Where the property "[is] reserved by its owner for private use" the state may not take the property without just compensation. However, in this case the property owner did not reserve the property for private use because the property owner after reasonable notice, did not properly assert his right to the property within the ten year period.

581 N.W.2d at 679. *Kentwood* correctly determined that Michigan's statutory presumption or implied dedication is reasonable exercise of state power. The Petitioners' misuse of *Nollan* offers no basis for attacking this determination.

As part of their effort to discredit *Texaco's* application, Petitioners also misconstrue two other Michigan

Supreme Court decisions. Petitioners cite to *Smith v. State Highway Commissioner*, 227 Mich. 280, 198 N.W.2d 936 (1924). However, like *Eager*, this case represented occasion in which the property owner successfully rebutted the presumption of 66 feet wide right-of-way. In addition, the Petitioners mistakenly cite to *Alton v. Meeuenberg*, 108 Mich. 629, 66 N.W. 571 (1890). In *Alton*, the question involved the evidentiary standard for initially determining whether road had been established by public use, which then initiates the statutory time period for the rebuttable presumption. Whether or not a public road by use has been initially established is a distinct issue from whether the owner rebutted the statutory presumption of a 66 feet width.

Therefore, *Texaco* invalidates the Petitioners' takings claim. The Petitioners' Writ is as much a request to re-examine *Texaco* as it is to review *Kentwood*.

ARGUMENT II

Michigan's Highway By User Statute Does Not Violate Due Process Of Law.

Petitioners wrongfully contend that the statutory presumption offends due process of law. However, *Texaco* also readily answers this contention.[10] On page 19 of their brief, the Petitioners complain that the highway by user

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[10] It should also be noted that the Michigan Supreme Court rejected a similar due process challenge to the Michigan's dormant mineral statute in *VanSlooten v. Larsen*, 410 Mich. 21, 299 N.W.2d 704 (1980), *cert. den.*, 455 U.S. 901 (1982).

statutory presumption violates procedural due process because it affords no notice to the property owner. This Court rejected the same argument in *Texaco*:

> Generally, the legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply. In this case, the two year grace period included in the Indiana statute forecloses any argument that a statute is invalid because mineral owners may not have had the opportunity to become familiar with its terms. It is well established that persons owning property within a state or charged with knowledge of relevant statutory provisions affecting the control and disposition of such property.

454 U.S. at 532.

Given the history of the Michigan's highway by user statute, Petitioners have been on notice since before the Civil War. As early as *Bumpus*, 4 Mich. at 162-163, *supra*, and in other cases, the Michigan Supreme Court ruled that the statute places the property owner on notice that if the public makes use of a roadway across or upon their land for a period of eight or ten years, then the property owner must take action, either by instituting a lawsuit or by engaging in an open and notorious use that interferes with or disturbs the public use. In this regard, the Michigan Supreme Court in *Ellsworth* stated:

> The statute, in all cases is fair notice to the owner that if he means to dispute the rightfulness of the public uses, he must assert his right within the prescribed period and in some way calculated to interfere with, disturb or interrupt

> such use by the public, or by institution of the suit for the judicial determination of the right.

27 Mich. at 256.

As noted by the Michigan Supreme Court in *Kentwood*, the Petitioners have no cause to complain about lack of notice. If they are to complain, then the complaint must be directed to "the original property owners who dedicated their land for public use pursuant to the statute". 598 N.W.2d at 680.

Petitioners improperly argue that statute provides inadequate notice because of inconsistent legal interpretations. Once again, Petitioners' argument is based on their mischaracterization of case law. They cite to *Scheimer v. Price*, 65 Mich. 638, 32 N.W. 873 (1887), as creating confusion in the law, but *Scheimer* concerned whether the highway existed in the first place, not the width of highway. *See, Alton*, 66 N.W. at 574, *supra*. Petitioners cite to *Wayne County Savings Bank v. Stockwell*, 84 Mich. 586; 48 N.W. 174 (1891), *and Coleman v. Flint & P.M.R. Company*, 60 Mich. 160; 31 N.W. 47 (1887), but these cases represent yet more examples where the property owner rebutted the 66 feet presumption. As appropriately observed by Michigan Supreme Court in *Kentwood*, Petitioners' cases: "all dealt with defendants who were able to present evidence that would rebut the presumption. . . . " 581 N.W.2d at 680.

In their argument about the "confused" State of Michigan law, Petitioners conveniently overlook the clear line of precedents dating back to *Bumpus* and including *Krueger, Ellsworth, Campau v. City of Detroit, supra*, where the Michigan Supreme Court repeatedly upheld the

rebuttable presumption. In fact, as recently as 1986 in *Eyde Brothers Development Co. v. Eaton County Drain Comm'r*, the Michigan Supreme Court upheld a rebuttable presumption in clear and unambiguous terms: "[T]he width of the easement is not confined to the paved surface . . . but includes the entire four rod or sixty-six feet." 398 N.W.2d at 310. Even accepting for the sake of argument that Petitioners' "confusion" contention is credible, the Michigan Supreme Court, through *Kentwood*, clarified the law, eliminating any possibility of confusion. In particular, the Michigan Supreme Court restricted the *Eager* cases to those circumstances where the presumption has been rebutted. 581 N.W.2d at 677.

The Petitioners also complain that the highway by user statute violates due process because it unfairly shifts the burden of proof to the property owner. The Petitioners rhetorically ask on page 22 of their Brief, "How can a private property owner interfere with a nonexistence public use?" In answer, common sense dictates that the public use of private land as a road ought to serve as fairly conspicuous notice to the property owner. In fact, as noted in the *Alton* case, cited by the Petitioners, to establish a public use of private land, the use must be open and notorious. 66 N.W. at 574. Under the statute, the fact that the public use may not initially utilize the entire 66 feet public right-of-way, does not defeat the presumption or implied dedication, unless the property owner takes action within the prescribed time period to assert his rights.

Petitioners wrongfully complain that the burden of proof placed on the modern day property owner is virtually insurmountable. They lament that present day

property owners are disadvantaged by the passage of time, death of a previous title holder, loss or destruction of records, or the removal of identifying features which might evidence an owner's intent to restrict use of the highway. These difficulties are apt to occur in a case where the Petitioners have challenged the validity of the statute that has existed in its essential form for over 160 years. In fact, as far as the City is concerned, these difficulties justify the presumption of 66 feet. The presumption serves a valid public purpose of creating some certainty as to the width of roads and clarifying the expectations of past, present and future private property owners. As noted by the Michigan Supreme Court in *Kentwood*:

> Because the burden is placed on the original property owner to rebut the presumption, the burden would remain with subsequent property owners to provide evidence that the presumption was rebutted. It would be illogical to shift the burden back to the government once the public is deemed to be the legal owner of the property.

581 N.W.2d at 680, n.10.

The highway by user presumption is not violative of substantive or procedural due process. As demonstrated by *Texaco*, the publication of the statute itself provides notice. 454 U.S. at 532. Certainly, a prescribed period of eight to ten years is reasonable. *Compare with United States v. Locke*, 471 U.S. 84, 108-109 (1985) (automatic forfeiture of mineral claims by missing annual filing notice by one day after receiving misinformation from a governmental official did not violate due process).

CONCLUSION

This is not a "takings" case. Instead, this case represents an improvident challenge to the lawful exercise of a state's power to define the scope of a property right. The fact that Michigan's highway by user statute, which dates back to 1838, conditions the retention of a property interest on an affirmative act of a land owner within a prescribed period of time, is neither repugnant to the takings clause nor to the due process clause of the United States Constitution. The Petitioners' Writ is answered by this Court's decision in *Texaco* which rejected the same takings and due process arguments. The Petitioners misplace their reliance on cases which are clearly distinguishable. Michigan's highway by user statute represents a reasonable exercise of state power and reasonable balancing of private and public interests.

Wherefore, the Respondent respectfully requests that this Court deny Petitioners issue of a Writ of Certiorari to review the decision of the Michigan Supreme Court.

Respectfully submitted,

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